No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY BRIEF OF PETITIONER WESTERN AIR LINES, INC.

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Initial Statement.

When stripped of trimmings the briefs of both Respondent Civil Aeronautics Board and Intervener Brotherhood of Railway and Steamship Clerks reduce down essentially to two basic theories on which they seek to uphold the challenged orders of the Board.

The first theory is that Western *misrepresented* the facts and thereby lulled the Board into the conclusion that the transfer of Route 68 from Western to United would not result in an adverse effect on any of Western's employees.

The second theory is that, since the transfer was consummated before the expiration of the time allowed by the Board's rules of procedure within which to file a petition

for reconsideration, Western assumed the risk of having an unconditional approval transposed into a conditional approval by an *ex post facto* order.

Neither of these theories is valid and neither weakens the arguments presented by Western in its opening brief.

I.

Western Did Not Misrepresent the Facts.

With language nearing acrimony the Board in particular, and the Brotherhood in degree, charge Western with having misrepresented the facts and connote that but for these misrepresentations approval of the sale of Route 68 would have been made conditional at the start.

The easy burden of blunting the Board's honed charge of misrepresentation need not be assumed in detail in this reply brief. It is sufficient to repeat, as was said in the opening brief, that Western's president was predicting not proclaiming and that he was careful to cushion his comments in a fashion that could not possibly have misled the Board, as the Board now claims to be the situation. This matter is accorded sufficient treatment in pages 26 through 31 of Western's opening brief.

Parenthetically it may be appropriate to note here that the principal witness for the Air Line Pilots Association, Captain A. W. Stephenson, acknowledged that in 1946 he was paid $11,383.13 by Western, in 1947 $12,382.22 and in 1948 (the year after the transfer of Route 68) $12,517.45. [I, R. 320-1.] The financial adversities claimed to have been suffered by the twenty-one pilots listed in Exhibit 1 of the Air Line Pilots [II, R. 771-85] was answered by Mr. Arthur F. Kelly on behalf of

Western. Most of them received more pay in 1948 than in 1947. [II, R. 703-6.]

The simple fact is that the September 1947 schedule reductions were the normal seasonal winter cutbacks which were placed in effect while Western was undergoing a system-wide program of economy, as evidenced by the fact that in the latter part of 1947 it had approximately 2486 employees compared with 1290 by December 1948. [II, R. 680.]

The basis for Mr. Drinkwater's prediction was that the new extension from San Francisco to Seattle, which was activated at about the same time the Los Angeles-Denver route was deactivated, would constitute an equalizing offset. [I, R. 41-2.] No statistician is required to affirm that this position was sound and entirely justified. Elementary geography confirms that an air route between San Francisco and Seattle is at least equal to an air route between Los Angeles and Denver, with leanings favorable to San Francisco-Seattle from the standpoint of population and climate.

The Board has founded its position on claimed *misrepresentations*. The reason for this, of course, is quite apparent. Under no conceivable theory, moral or legal, could the Board hope to justify its *ex post facto* order other than by claiming misrepresentation.

In its order of July 7, 1950, the Board tacitly conceded the basis of its position when it said:

> "The situation is not altered in this case by reason of the fact that we have already approved the transfer of Route 68 and related physical properties by Western to United without conditions for the benefit of adversely affected employees and that the trans-

fer thus approved has been consummated. As our opinion makes clear, in declining to impose conditions for the benefit of Western's employees in our original order of approval, we relied on the representations of Western's president that its employees would not be adversely affected by the transfer. United-Western, Acquisition of Air Carrier Property, 8 C. A. B. 298, 311. Regardless of whether we could modify our order to impose such conditions in the absence of those representations, we think it clear that Western by reason of them is estopped to challenge any such modification in this proceeding." [II, R. 831.]

In its brief the Board stated on page 8:

"Accordingly, the Board was authorized to amend its order to remedy defects in its initial order of approval which were procured through misrepresentation."

And again on page 16 of its brief:

"Accordingly, and irrespective of the fact that a timely filed petition for reconsideration was pending, the Board had authority to reopen the proceeding because its initial order was procured through misrepresentation."

The evidence presented by Western at the original hearing, both oral and written, which formed the basis for the original unconditional order of approval dated August 25, 1947, was candid and fair. Since any misrepresentation is so completely lacking time need not be spent in probing the record in proof of the fact that substantial evidence likewise is lacking that any employee was adversely affected in consequence of subsequent developments.

II.

Western Did Not Voluntarily Implement the Unconditional Approval With an Assumption of Risk.

In addition to the theory of estoppel predicated on misrepresentation, both the Board and the Brotherhood hold to the view that Western voluntarily consummated the sale of Route 68, which had been unconditionally approved, with full knowledge that the time to file a petition for reconsideration had not expired and that accordingly Western knowingly assumed the risk of having the unconditional order subjected to *ex post facto* modifications. This postulate completely ignores the facts and the law.

On page 24 of its opening brief Western referred to the Board's supplemental opinion on reconsideration in the *Kansas City-Memphis-Florida* case, reported in 9 C. A. B. 401, with this quotation from page 408:

> "In view of our present decision affirming our former judgment, *it will be unnecessary to discuss the question vigorously presented by counsel for Chicago and Southern concerning the statutory power of the Board to revoke upon reconsideration a certificate of public convenience and necessity which was issued and made effective at the time of the original decision. We have grave doubt, however, as to our possession of such power,* and in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case."[1]

In its Brief the Board ignored this quotation and ignored the point for which it was cited by Western.

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[1]Emphasis in quoted material added throughout unless otherwise noted.

Section 401(h) of the Civil Aeronautics Act [49 U. S. C. 481 (h)][2] provides that a certificate may be revoked in whole or in part for intentional failure to comply with any provision of Title IV of the Act or of any order, rule or regulation issued under the Act, or of any term or condition or limitation of the certificate, with the express proviso that no certificate shall be revoked unless the holder fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the matter found by the Board to have been violated.

By its supplemental order of September 11, 1947 [II, 894-903] the Board cancelled Western's certificate for Route 68 and amended United's certificate for Route No. 1 to include Los Angeles-Denver effective September 15, 1947, at 12:01 A. M. The only legal way in which the Board could revoke United's certificate for Route 1 in part by eliminating Los Angeles-Denver would be under Section 401(h).

Valid conditions to approval of the transfer of a route can be imposed only at the time the approval is granted, which of necessity must be prior to consummation of the transfer. No mental gymnastics and no linguistic legerdemain can alter this simple truth. After a transfer has been effected pursuant to an unconditional approval, the only means whereby conditions could be imposed would be by revoking the transfer, restoring the status quo and then approving a new transfer with conditions. Once the transfer had been consummated under the Board's order of September 11, 1947, the Board was powerless to undo

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[2]A copy of Section 401(h) is included in the Appendix to Western's opening brief.

that which it had done except under the provisions of Section 401(h). This was not done.

In its final order of December 29, 1950, the Board attempted to meet this point by stating:

> "Western argues that there is no way in which the Board can enforce its order of July 7 and compel Western to comply with the conditions. But it seems to us that we have the same power in this case as in any other. Failure by Western to comply with the conditions of the July 7 order would render inoperative the approval heretofore granted under sections 401(i) and 408(b) to the transfer to United of Route 68 and related physical properties. By refusing to comply with the conditions, Western would, unless it could undo the transaction with United, be placing itself in violation of sections 401(i) and 408(b) and would be subject to all the penal and enforcement provisions of the Act applicable to such violation. The fact that Western might find it impractical to undo the transaction would not be a defense because the failure to impose conditions in the original order of approval was due to the Board's reliance on testimony by Western's president and because by consummating the transaction prior to the expiration of the time fixed for reconsideration, Western went ahead at its own risk." [II, R. 863.]

Section 401(i) referred to in the quotation reads:

> "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

The transfer was approved unconditionally by the order of August 25, 1947. By the order of September 11, 1947, Western's certificate for Los Angeles-Denver was can-

celled and United's certificate amended to include Los Angeles-Denver, both effective simultaneously at 12:01 A. M. on September 15, 1947. In as much as Western acted in good faith and under full color of right, it is not known how Western could stand in violation of Section 401(i) if it did not choose to comply with the *ex post facto* conditions but instead insisted that its certificate be restored since the Board now purports to disprove the transfer unless conditions are met.

Section 408(b), likewise referred to in the quotation, empowers the Board to approve certain purchases by one carrier from another "upon such terms and conditions as it shall find to be just and reasonable." When Western acted in good faith under authorization of the unconditional approval of August 25, 1947, and under compulsion of the mandatory order of September 11, 1947 there were no conditions to be met. Failure to comply with conditions imposed after the fact would hardly be a violation of Section 408(b).

On page 8 of its brief the Board claims that Western *voluntarily* consummated the transfer agreement prior to the expiration of the time allowed for filing petitions for reconsideration and that Western accordingly assumed the risk that labor protected conditions or other changes in the Board's order subsequently might be imposed.

In like vein the Brotherhood, commencing on page 32 of its brief, makes light of Western's contention that the transfer of the certificate was compulsory under the order of September 11, 1947, and that it was not in any sense a voluntary act which might be attended with an assumption of risk.

The chiding words used by the Board and by the Brotherhood do not answer the facts and fail completely

to undermine the effect of the terse directives in the order of September 11, 1947, which reads:

"It is Ordered:

1. That effective September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time, the certificate of public convenience and necessity for Route No. 68 issued to Western Air Lines, Inc., pursuant to Order Serial No. 3263, dated November 11, 1944, be and it is hereby cancelled;

2. That the certificate of public convenience and necessity for Route No. 1 issued to United Air Lines, Inc., pursuant to Order Serial No. E-783, dated September 3, 1947, be amended and issued in the form attached hereto;

3. That said amended certificate shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and shall be effective on September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time;

4. As of 12:01 a.m., Pacific Coast Standard Time, all authorizations by the Board then in effect to render scheduled nonstop service between points on Route No. 68 and all authorizations by the Board then in effect to serve regularly any point on Route No. 68 through an airport convenient thereto shall be deemed to be transferred to United Air Lines, Inc." [II, R. 894-5.]

These are not words of permission, they are words of direction.

Admittedly this order was to Western's liking. That is precisely what Western was seeking when it filed its application jointly with United for approval of the transfer. [I, R. 3-13.] But the fact remains that when Western ceased operations as of 12:01 A. M., Pacific Coast

Standard Time on September 15, 1947, it was doing so under the mandate of the Board and not voluntarily with a voluntarily assumed risk. Had Western not discontinued flying between Los Angeles and Denver at 12:01 A. M., on September 15, 1947, it would have been in direct violation of Section 401(a) (49 U. S. C. 481) which provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation . . ."

The fact that the petition for reconsideration was filed within the time allowed by the rules does not alter the facts. If the *ex post facto* order being challenged is allowed to stand, Western will be compelled to comply with conditions which the law clearly provides can only be imposed under circumstances which will permit the party an effective choice of accepting a condition and going forward or rejecting the condition and becoming resigned to a denial of approval.

The case of *Falwell v. United States,* 69 Fed. Supp. 71, cited by the Brotherhood on page 33 of its brief and by the Board on pages 15 and 17 of its brief, is not authority against Western's position. In that case the parties in fact *voluntarily* went forward with the approved transaction.

The unfounded charge of misrepresentation and the utterly unsupported claim of voluntary assumption of risk are not equitable, legal or moral answers to the issues. The fact remains that Western in good faith did only that which it had to do and is now being denied the legal right of a choice which it would have had, had the Board administered its trust properly.

III.

Neither the Board nor the Brotherhood Has Met the Argument That the Order Illegally Compels Arbitration.

In its opening brief Western urged that the provision for arbitration in the July 7, 1949 order [II, R. 842-47] is illegal on two points. First, the Board cannot make findings, as required by Sections 401(i) and 408(b) of the Act, that an award of arbitrators to be made sometime in the future is consistent with the public interest and is just and reasonable. Second, since the Board ordered compliance with the provision of the arbitration award and did not reserve the power of review, Western would be denied the essential safeguard of a right of court appeal from the arbitration award.

Both the Board and the Brotherhood sought to sidestep the first point with the contention that to require the Board to determine the precise conditions would be too burdensome because too time consuming. No doubt it would be time consuming for the Board, by one of its examiners, to determine which of Western's employees, if any, had been adversely affected and how much money Western should pay to each. But Congress in effect has said that Western is entitled to have the Board determine this, not three unsworn and unskilled arbitrators, one of whom, Western's appointee, would be biased in favor of Western, one of whom, the Union's appointee, would be biased against Western and the third of whom would be a completely unknown quantity.

The Brotherhood, commencing on page 29 of its brief, attempted to argue that the Board did retain jurisdiction to review the award of the arbitrators, quoting in support

of its contention paragraph 12 of the July 7, 1950, order which reads:

> "12. The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 847.]

This does mean, no matter how liberally construed, that the Board would have the power to review and modify the award of the arbitrators, with respect to which Western would be forced to comply by paragraph 9 of the same order.

The Board and the Brotherhood endeavored to counter Western's second point, that it would be denied a right of court review from an unconscionable award of the arbitrators, on the apparent theory that Western could petition the Board to review the award of the arbitrators, despite the lack of a provision to that effect in the order being challenged, and that a denial of that petition would form the basis of a right of court review.

Section 1006 of the Civil Aeronautics Act, which creates the right of court review, does not warrant this conclusion. In the first place, there is no provision in the Act empowering the Board to compel a party in a proceeding before it to submit any matter to arbitration. In the second place, there is no provision in the Act nor in the order being challenged providing a means for

petitioning the Board to review and, if justice required, modify an award of the arbitrators. This being so, a naked order of the Board denying a petition to review an award of the arbitrators could not form the basis of a petition to this court to review an invalid award of the arbitrators.

Conclusion.

The arguments presented by Western in its opening brief to the effect that the orders being challenged are not just and fair and do violence to the Civil Aeronautics Act have not been met by the Board or by the Brotherhood.

October 22, 1951.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,
HUGH W. DARLING,
Attorneys for Petitioner.

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused to be served the foregoing brief upon the attorneys of record for the Civil Aeronautics Board, the Brotherhood of Railway and Steamship Clerks and the Air Line Pilots Association by mailing five copies to each, properly addressed with postage prepaid.

Los Angeles, California, October 22, 1951.

George G. Gute